

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEB 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. <u>92-310</u>
)	
ROBERT M. RICHMOND)	File No. BPH-910703MD
)	
BARBARA BRINDISI)	File No. BPH-910703MI
)	
LAURYN BROADCASTING CORPORATION)	File No. BPH-910703MJ
)	
For Construction Permit for a New)	
FM Station on Channel 265A)	
in Beaumont, California)	
)	
and)	
)	
KAY SADLIER-GILL)	File No. BPH-910611IF
)	
For Modification of Facilities)	
for Station KATY-FM at Idyllwild,)	
California)	

To: Honorable Walter C. Miller
Administrative Law Judge

**PETITION FOR LEAVE TO AMEND
AND AMENDMENT**

Lauryn Broadcasting Corporation ("Lauryn"), by Counsel, and pursuant to §§1.65 and 73.3522(b) of the Commission's Rules, hereby submits the instant Petition for Leave to Amend and Financial Amendment. In support hereof, Lauryn submits the following:

Background

On 3 July 1991, Lauryn's Application for an FM Construction Permit at Beaumont, California, was filed with the FCC. At that time, Lauryn was represented by Gary S. Smithwick, Esquire of the law firm of Smithwick & Belendiuk. At the time of filing, Lauryn relied upon a financial

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commitment letter from World Trade Bank for the financial certification of its FM application proposal.

As will be fully explained below, Lauryn was forced to secure a new source of financial commitment soon after its original application was filed. Lauryn promptly secured a new financial commitment letter, and immediately sent a copy of the new financial letter to Mr. Smithwick. However, Mr. Smithwick never prepared the requisite amendment to Lauryn's application to report the new source of financing. It wasn't until Lauryn changed counsel soon after the issuance of the 21 January 1993 "Hearing Designation Order" ("HDO")/¹ that Lauryn learned that the financial qualifications showing in its FCC application was never amended to report the new source of financing.

**Lauryn Has Always Acted Diligently
In The Preparation And Prosecution Of Its Application**

Attached hereto as Exhibit No. 1 is the sworn Declaration of Lauryn Nicole Cox, the 100% owner of Lauryn./² Ms. Cox describes the steps she took to secure a copy of her original financial commitment letter from World Trade Bank./³ See,

¹ DA 92-1733

² Ms. Cox signed a fax copy of her Declaration. Her original signature appears on the "original copy" filed with the Secretary's Office. However, since the signed fax copy of the Declaration may be difficult to read after second-generation photocopying, an exact unsigned copy of the Declaration is also being submitted as Exhibit 1-A for the convenience of the Commission.

³ A copy of the World Trade Bank financial commitment letter, dated 1 July 1991, is submitted herewith as Exhibit No. 2. The World Trade Bank letter is subject to Automatic Document Production, scheduled for 16 February 1993. However, the letter

Exhibit No. 1 at page 2. Ms. Cox showed World Trade Bank her personal financial information, including assets and liabilities. She filled out a financial questionnaire, and showed the bank her radio business plan. She met with Peter Lambert, the Senior Vice President. Mr. Lambert photocopied some of her papers. On 1 July 1991, World Trade Bank issued the financial commitment letter to Lauryn.

As Ms. Cox explains, soon after her FCC Application was filed, she learned that Mr. Lambert was leaving World Trade Bank. She immediately called Mr. Lambert to discuss her radio financing. Mr. Lambert told her that the remaining bank executives were uneasy about broadcast loans, and did not know of Ms. Cox' background and reputation. Since Mr. Lambert gave Ms. Cox the impression that the bank would withdraw their financial commitment to Lauryn upon his departure from the bank, she immediately took steps to secure new financing. See, Exhibit No. 1, at pages 2 & 3.

Ms. Cox immediately called Mr. Smithwick. She was told to seek new financing. She visited several potential lending institutions, including Superior Financial Mortgage Lending Services ("Superior Financial"). She met with Lloyd Taylor, President of Superior Financial. She showed Mr. Taylor her personal financials and radio business plan, and filled out a financial questionnaire. Ms. Cox worked with Mr. Smithwick in getting the proper draft language to Mr. Taylor for the new

is being produced early since it is relevant to the matters at issue here.

financial commitment letter. And, when Superior Financial issued Lauryn a financial commitment letter on 1 August 1991, Ms. Cox immediately faxed a copy of the letter to Mr. Smithwick.⁴ Two days later, Ms. Cox also sent Mr. Smithwick the original Superior Financial financial commitment letter via overnight delivery. See, Exhibit No. 1 at page 3.

**Lauryn Reasonably Relied Upon
Prior Counsel's Advice**

Lauryn, through its 100% owner Ms. Cox, is a first time applicant before the FCC. As a lay person, Ms. Cox can be expected to rely upon the advice of her counsel. As her Declaration indicates, she did much of the leg work in preparing Lauryn's application, and regularly consulted with Mr. Smithwick. Ms. Cox kept Mr. Smithwick apprised of the matters relating to Lauryn's source of financial commitment, and specifically the need to secure a new source of financing. As soon as the new financial commitment letter was secured from Superior Financial, Ms. Cox sent it to Mr. Smithwick twice --- via fax and overnight delivery.

The reason why Lauryn's application was never amended earlier may be found once prior counsel's correspondence and verbal admissions are more closely scrutinized. First, Ms. Cox received a letter dated 25 July 1991 from Mr. Smithwick.

⁴ A copy of the Superior Financial financial commitment letter, dated 1 August 1991, is submitted herewith as Exhibit No. 3. The Superior Financial letter is subject to Automatic Document Production, scheduled for 16 February 1993. However, the letter is being produced early since it is relevant to the matters at issue here.

The 25 July 1991 letter, attached hereto as Exhibit No. 4, advised Ms. Cox of the need to comply with Section 1.65 of the Commission's Rules. Therein, Mr. Smithwick listed the kinds of changes in the application that require an amendment. Although the language of the letter indicates that the list is illustrative and not comprehensive, financial qualifications changes was not listed. In any event, a lay person's reading of the letter might not alert them to the fact that changes in the source of financial commitment would require an amendment to the application.

The 25 July 1991 letter takes on added significance when it is considered in conjunction with statements Mr. Smithwick recently made during a three-way telephone conversation with Ms. Cox and Lauryn's new counsel, Cary S. Tepper. As Ms. Cox explains in her Declaration, during that conversation Mr. Smithwick expressed doubt that a change in sources of financing required an amendment to the application. Mr. Smithwick said that he never used to file such amendments when sources of financing changed. However, Cary Tepper explained that the new FCC Form 301 Form specifically requires the identification of the source of financing. Thus, Mr. Tepper advised Mr. Smithwick that, under the new FCC Form 301, a change in the source of financing requires an amendment. Mr. Smithwick then agreed. See, Exhibit No. 1, at pages 4 & 5.

Based upon Mr. Smithwick's recent admission during the three-way telephone conversation, as well as a review of his 25 July 1991 letter, it is probable that a financial amendment

in this instance was never contemplated by Mr. Smithwick. Also, Mr. Smithwick recently told Ms. Cox and Cary Tepper that he always thought the Superior Financial financial commitment letter was a "back-up" financing letter. See, Exhibit No. 1 at page 4. Therefore, Mr. Smithwick recently admitted that he simply did not think a financial amendment was necessary./⁵

**Good Cause Exists For The
Acceptance of Lauryn's Amendment**

Section 73.3522(b) of the Commission's Rules states that non-engineering post-designation amendments will be considered only upon a showing of good cause for late filing. And, in instances such as these, Commission precedent offers some additional guidance:

(1) "In weighing requests to amend an application at a point in time after a hearing has commenced, we are bound to apply the "good cause" test imposed by §73.3522 of the rules The elements of that test are expatiated upon in Erwin O'Conner Broadcasting Co. In the recent past, the Commission has relaxed that test somewhat insofar as it applies to matters such as bank loans and it has held that the elements contemplated in

⁵ Lauryn sought a Declaration from Mr. Smithwick regarding his understanding surrounding these events and issues. Counsel for Lauryn sought a Declaration that would explain Mr. Smithwick's understanding of the events, irrespective of whether such understanding was consistent with that of Ms. Cox. At first, Mr. Smithwick was willing to cooperate. However, when Mr. Smithwick was advised that Ms. Cox' recollection of events was not identical to his, Mr. Smithwick placed certain conditions on his continued cooperation. For example, Mr. Smithwick wanted to see Ms. Cox' Declaration before he finalized his Declaration. And, subsequently, Mr. Smithwick requested that his statement be in the form of a letter, and specifically not sworn to under the penalty of perjury. Lauryn decided not to meet Mr. Smithwick's conditions, and Mr. Smithwick's cooperation ended at that time.

Erwin O'Conner ... "should be interpreted in light of the equities of the case" ... See, Dutchess Communications Corp., 58 RR 2d 381 (Rev. Bd. 1985) at para. 9. (Citations and Footnotes Omitted).

(2) The due diligence requirement should be interpreted in light of the equities of the case. See, Anax Broadcasting, Inc., 49 RR 2d 1589 (1981) at para. 17.

(3) "The Board looks to both quantity and quality of effort in measuring the equities of due diligence." See, Coastal Bend Family Television, Inc., 54 RR 2d 367 (Rev. Bd. 1983).

Lauryn was thorough and diligent in securing both its original and subsequent financial commitments. Lauryn did everything it was told by prior counsel, and reasonably relied upon counsel for the proper prosecution of its application.

The Commission has long held that good faith reliance on counsel may constitute sufficient mitigation. See, Las Americas Communications, Inc., 61 RR 2d 1008 (Rev. Bd. 1986) at para. 13. Also, since there is no question that Lauryn was properly financially qualified when it filed its original application, there is no bar to accepting Lauryn's late-filed financial amendment. See, Aspen FM, Inc., 68 RR 2d 1635 (1991) (A demonstration that a broadcast applicant was financially qualified at the time it certified its application is essential to a showing of good cause for accepting a late-filed financial amendment from the applicant.)

The Financial Amendment

Attached hereto as Exhibit No. 5, is the Amendment Letter of Lauryn, dated February 9, 1993, which proffers a revised Page 8 to FCC Form 301 to substitute Superior Financial for World Trade Bank as the source of financing.

Conclusion

WHEREFORE, the foregoing premises considered, Lauryn respectfully requests that the instant Petition for Leave to Amend be GRANTED, and that Lauryn's associated Financial Amendment be ACCEPTED.

Respectfully submitted,

LAURYN BROADCASTING CORPORATION

By: 
Cary S. Tepper, Esq.

Its Counsel

**Meyer, Faller, Weisman
and Rosenberg, P.C.**
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015

(202) 362-1100

February 10, 1993

EXHIBIT No. 1

(Declaration of Lauryn Nicole Cox)

DECLARATION OF
LAURYN NICOLE COX

My name is Lauryn Nicole Cox. I am the 100% owner of Lauryn Broadcasting Corporation. This is my sworn statement of what has occurred, and what is now occurring, about my FCC application for Channel 265A, Beaumont, California. I am asking that this statement be entered into the record of the Beaumont proceeding.

I recently learned that my Beaumont application was not amended in 1991 to report my new source of financing. I want the FCC to know exactly what happened. I did everything my original attorney, Gary Smithwick, advised me to do. But, I now know that Mr. Smithwick did not do all the things he was supposed to do. At this juncture I am a little gun shy of attorneys but I do want to tell the truth about what concerns me.

I have a lot at stake as an applicant for Channel 265A, Beaumont, California. I worked very hard in preparing a correct application and doing all the things Mr. Smithwick told me to do. My pursuit of a new radio station is something I have wanted for a very long time. I believe that I had a very strong application that gave me good qualifications to be competitive with the other applicants. Now, because of the mistakes made by Mr. Smithwick, I may get an issue raised against me for something that is not my fault.

Late last month I received a call from Mr. Smithwick about my application. I was not at home, but this is the exact message he left on my answering machine:

"Lauryn, this is Gary Smithwick in Washington. I received a call from the Judge who will be presiding over the Beaumont case. His name is Walter C. Miller and he is a handful. I have to tell you about him when you call

me. This is definitely a case that I would prefer not to try. I'll tell you about him when you call me."

The tone of Gary's voice worried me. I had this feeling that he wasn't telling me everything. I became suspicious. Then I decided to call some friends who were also FCC applicants. I asked them about their experiences with attorneys. They told me that their attorneys kept them fully informed about what they were doing, that their attorneys always accepted their phone calls, and answered all their questions. They said that their attorneys kept them fully briefed at all times. I was not treated this way by Mr. Smithwick. On January 27, 1993, I decided to seek new counsel. I hired Cary Tepper.

After Mr. Tepper received my files and thoroughly reviewed them, he called me On January 29, 1993 to ask about the two financing letters he saw in my files. I told him that the original financial letter from World Trade Bank was no longer valid. I told Mr. Tepper that the only person at World Trade Bank with knowledge and confidence in broadcast investments was Peter Lambert. Before World Trade Bank wrote me a financial letter, I talked with Mr. Lambert many times, and met with him to show him some personal financial information. Mr. Lambert asked me to fill out a financial questionnaire. I listed my assets and liabilities. I also showed him my business plan for the Beaumont radio station. He asked me many questions, and he made copies of some of my papers. World Trade Bank wrote me the financial letter a few days before I had to file my application with the FCC.

A few weeks after my Beaumont application was filed with the FCC, I heard that Mr. Lambert was about to leave the bank. When I heard about this, I called Mr. Lambert. He told me that the remaining bank executives were uneasy about broadcast loans and did not know of my background and reputation. Mr. Lambert told me that

once he left the bank, he could not guarantee that the bank would not change its mind and withdraw its financial commitment letter to my FCC application.

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I remember the last time I spoke to Mr. Smithwick with regard to the new financing letter. It was about September 1991. I informed Mr. Smithwick that Mr. Taylor called me regarding a phone call that he received from the FCC inquiring about my financing. Mr. Smithwick informed me that no one from the FCC calls your lending institution. He expressed his opinion that the call to Mr. Taylor was made by one of the opposition's attorneys who wanted

information about my financial letter because we were discussing potential settlement. After this, I told Mr. Smithwick that I would call him right back with Mr. Taylor on the line.

I then introduced Mr. Smithwick to Mr. Taylor during a three-way phone conversation. Mr. Smithwick told Mr. Taylor not to give out any information about the financial commitment letter, and to please direct all future calls to him (Mr. Smithwick). Mr. Smithwick then gave his telephone number to Mr. Taylor and the conversation ended.

During one of my initial telephone conversations with Mr. Tepper on January 29, 1993, he told me that he did not see an amendment to my application for the new financial commitment letter. Mr. Tepper then told me that maybe Mr. Smithwick did not send me a copy of the amendment. Also, Mr. Tepper asked me if I remembered receiving a copy of an amendment for the new financial letter, and also asked me if I ever signed an amendment letter addressed to the FCC. I told him "No."

Mr. Tepper told me to stay on the phone. We both called the FCC to see if they had a file number for any amendments to my application. We were told that no amendments were ever filed to my application. We then called Mr. Smithwick.

Mr. Smithwick told us that he remembers discussing the new financial letter but he just assumed that it was a "back-up letter" so he didn't think the application needed to be amended. During our three-way telephone conversation, when Mr. Tepper told Mr. Smithwick that an amendment must be filed to report any change in the source of financing, Mr. Smithwick disagreed at first. Mr. Smithwick said that he never used to file such amendments. But, Mr. Tepper reminded Mr. Smithwick that the FCC application form had changed. Mr. Tepper said that now the new form specifically asks you to list your source of funds. Mr. Tepper told Mr. Smithwick

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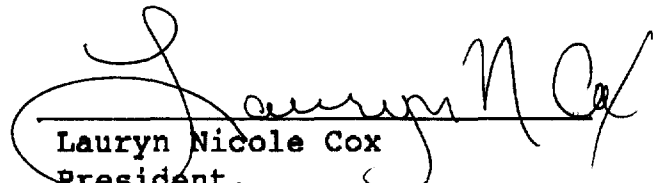
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Under the penalty of perjury, I declare that the foregoing facts are true and correct to the best of my knowledge, information and belief.

Dated: _____

2/9/93



Lauryn Nicole Cox
President,
Lauryn Broadcasting Corporation

EXHIBIT No. 1-A

**(Unsigned "Hard Copy" of
Declaration of Lauryn Nicole Cox)**

**DECLARATION OF
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Under the penalty of perjury, I declare that the foregoing facts are true and correct to the best of my knowledge, information and belief.

Dated: _____

Lauryn Nicole Cox
President,
Lauryn Broadcasting Corporation

EXHIBIT No. 2

**(Financial Commitment Letter
from World Trade Bank)**

World Trade Bank

9944 Santa Monica Boulevard
Beverly Hills, California 90212-1691
Telephone 213/551-0100
FAX 213/556-6721

July 1, 1991

Ms. Lauryn Nicole Cox

LAURYN BROADCASTING CORPORATION
137 S. San Fernando Blvd.
Burbank, Calif. 91502

Dear Ms. Cox:

This letter will confirm the willingness of our Bank to consider a loan to you, and/or a corporation controlled by you, in the amount of \$400,000 to finance the construction and initial operation of your proposed new FM radio station in Beaumont, California, under the following terms and conditions:

Term: Five years on one year notes.
Repayment: Interest only for the first year then fully amortized over the remaining 48 months.
Rate/Fees: WTB prime plus 2.5%. Loan fee of 3.0%
Collateral: Pledge of station assets and of stock of corporation, if any.

We understand that the Federal Communications Commission requires that you have reasonable assurance of the availability of the above described loan. This letter is intended to provide such reasonable assurance but does not constitute a binding commitment on the part of the Bank to make the loan. We are familiarizing ourselves with your credit history. Our willingness to make such a loan is expressly conditioned upon your receiving all necessary authorizations from the FCC, including the grant of your application for a construction permit in Beaumont, Calif. and is subject to:

1. No adverse changed conditions in the circumstances presented to the Bank which were considered in our evaluation of the loan request.
2. A satisfactory credit review.
3. The negotiation of loan documents (including, without limitation, security and guaranty agreements) all satisfactory to the Bank, and its council, in their sole discretion.

Yours very truly,



Peter F. Lambert
Senior Vice President
Entertainment Industries Division

EXHIBIT No. 3

**(Financial Commitment Letter
from Superior Financial)**